

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

J. S. CARAMBOLA, LLP d/b/a CARAMBOLA  
BEACH RESORT,

and

OUR VIRGIN ISLAND LABOR UNION  
(OVILU)

Case 24-CA-10951

**STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

Comes now Counsel for the Acting General Counsel (CGC) and submits its Statement in Support of Motion for Summary Judgment and respectfully states and prays as follows:

**I. Statement of the Proceeding**

A. On October 25, 2007, a secret-ballot election under the supervision of the Regional Director for Region 24 of the National Labor Relations Board, herein called the Board, was conducted among the following employees herein called the Unit, which constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act. (See Tally of Ballots attached as Exhibit 3 to Motion for Summary Judgment dated August 8, 2008).

All full-time and regular part-time employees, including cooks, bartenders, housekeeping and laundry workers, receptionist, waiters, waitresses, and maintenance workers, who are employed by the Employer at its facility in St. Croix, United States Virgin Island; but excluding all other employees, guards, and supervisors as defined in the Act.

1. Respondent filed Objections to the election and on January 16, 2008, a Hearing Officer's Report and Recommendation issued overruling Respondent's Objections.

2. Respondent filed Exceptions to the Hearing Officer's Report and Recommendation and on May 28, 2008, the Board issued a Decision and Certification of Representative in Case 24-CA-8577 adopting the Hearing Officer's findings and recommendations and certifying Our Virgin Island Labor Union (OVILU), herein called the Union, as the representative of the Unit for the purposes of collective bargaining, and therefore was the exclusive collective bargaining representative of the employees in said Unit.

3. Respondent filed Exceptions to the Board's Certification and thereafter on September 17, 2008, a two members Board issued a Decision and Order in Cases 24-CA-10951 and 24-RC-8577.

4. Respondent filed a Petition for Review in the United States Court of Appeal for the Third Circuit, and the General Counsel filed a cross- application for enforcement.

5. Upon remand from the Court of Appeals for the Third Circuit for further proceeding consistent with the Supreme Court's decision in New Process Steel L.P. v NLRB, 136 S. Ct. 2635, the Board on August 6, 2010, issued a Decision, Certification of Representative and Notice to Show Cause in this proceeding. (See Exhibit 1 attached to Motion Submitting Amended Complaint and Request for Summary Judgment dated September 7, 2010).

6. On September 3, 2010, the Regional Director for Region 24 issued an Amended Complaint and Notice of Hearing to conform the pleadings of the original Complaint issued on July 15, 2008, with the Decision, Certification of Representative and Notice to Show Cause issued by the Board on August 6, 2010. (See Exhibit 2 attached to Motion Submitting Amended Complaint and Request for Summary Judgment dated September 7, 2010).

On September 7, 2010, CGC filed with the Board a Motion Submitting Amended Complaint and Request for Summary Judgment based upon its prior Motion for Summary Judgment dated August 8, 2008.

7. On September 9, 2010, the Board issued an Order granting Respondent until September 23, 2010, to file its answer to the Amended Complaint and Notice of Hearing and Notice to Show Cause as to why the Board should not grant General Counsel's Motion for Summary Judgment.

II. **Respondent's Answer to the Amended Complaint Raise No Material Issues of Facts**

B. CGC respectfully submits that Summary Judgment should be granted with respect to the allegations contained in the Amended Complaint in this proceeding on the grounds that there is no genuine issue as to any material fact framed by the pleadings in view of Respondent's Answer to the Amended Complaint, and that the Acting General Counsel is entitled to a judgment as a matter of law. In this regard, Counsel for General Counsel submits as follows:

1. Respondent's Answer to the Complaint is dated September 23, 2010, and was received electronically in the Regional Office on that same date (Attached as Exhibit 1).

2. Respondent's Answer, including its affirmative defenses, raises no real issue which has not been litigated and determined by the Board in Case 24-RC-8577. The Board and the Courts have consistently held that issues which have been or could have been raised and litigated in prior representation proceedings cannot be re-litigated in subsequent unfair labor practice proceedings. Pittsburg Plate Glass v NLRB, 313 U.S. 146 (1941); St. Margaret Memorial Hospital, 307 NLRB No. 17 (1992). In that regard, it is noted that Respondent's denial of Complaint paragraph 4, regarding Petitioner's labor organization status, and Respondent's denial of Complaint paragraph 5, concerning the appropriateness of the Unit, both were issues that could have been litigated in the representation proceeding. However, Respondent chose not to litigate those issues in the representation proceeding and executed instead a Stipulated Election Agreement in order to proceed directly to an election. Therefore, it cannot now contest said issues in the present case. In any event, it is General Counsel's contention that the Unit constitutes an appropriate unit for purposes of collective bargaining within the meaning of Section 9 of the Act, as it is in accord with the Board's Decision and Certification of Representative, which issued on August 6, 2010. Regarding Respondent's denial of the Union's labor organization status, the Board in Innovative Communications Corp, 333 NLRB

665, 672 (2001), found the Our Virgin Island Labor Union to be a labor organization within the meaning of the Act.

3. With regard to Respondent's denial of Complaint paragraph 6(b) concerning the Union's status as the collective bargaining representative of the employees in the Unit, it is noted that Respondent specifically contends that its denial is based on its original Objections to the Conduct of the Election and its Exceptions to the Hearing Officer's Report and Recommendation on Objection, issues which were all resolved by the Board in its Decision and Certification of Representative dated August 6, 2010. It is well settled that issues raised, litigated and decided in a prior representation case may not be re-litigated in a subsequent unfair labor practice proceeding, and that the findings on those issues are binding on the parties, absent newly discovered or previously unavailable evidence. Nebraska Methodist Hospital, 222 NLRB 1, (1976); Rules and Regulations of the Board, Section 102.67 (f). Respondent does not contend that there is any newly discovered or previously unavailable evidence. Therefore, the issue of the Union's status as the collective bargaining representative of the employees in the unit may not be re-litigated at this late date.

4. Respondent's denial of Complaint paragraphs 7(a) and (b) does not appear to seriously dispute these allegations, as it admitted in its Answer that the Union, through an e-mail communication in June 2008, requested Respondent to bargain with it as the collective bargaining representative of the Unit. Respondent has not denied that it has failed and refused to recognize and

bargain with the Union although requested to do so. Instead, Respondent claims in its Answer to the Amended Complaint that it properly refused to bargain with the Union because it has challenged the certification of the Union.

In general, an employer's duty to bargain with a union begins when two things happen; first, a union must obtain the support of a majority of employees in a unit appropriate for collective bargaining. Second, after obtaining such majority status, the union must demand to bargain; at that point, the employer has a duty to recognize the Union and bargain with it. Here, the Union became the employees' representative on the election date October 25, 2007, when it received a majority of valid votes. The Board's subsequent certification simply confirmed that fact. See Hankins Lumber Co., 316 NLRB 837, 861 (1995), citing Venture Packaging, 294 NLRB 544, 548 n.5 (1989) *enfd mem* 923 F.2d 855 ( 6<sup>th</sup> Cir. 1991).

Although, Respondent now contends that at the time the Board issued its Amended Complaint on September 3, 2010, the Union had made no new demand for recognition or bargaining. Respondent admitted that on June 16, 2008, the Union sent its initial letter requesting to meet and bargain. This letter constitutes a continuing demand for recognition and bargaining and it was made at a time the Union already enjoyed the support of a majority of employees in the collective-bargaining unit, and was, therefore, the exclusive bargaining representative. Thus, since June 26, 2008, both conditions necessary to establish a bargaining duty had been satisfied. The Union enjoyed majority support and it had made the demand to negotiate. The certification date is the

date when Respondent's limited duty to bargain, following the Union's election victory, ripens into a plenary statutory obligation. Celotex Corp., 259 NLRB 1186, 1183 (1982).

Although Respondent contends that the May 2008, certification was not duly issued by a Board with quorum and that the Union has not renew its request for recognition and bargain after the Board's certification of representative dated August 6, 2010, it is noted that the Union in fact renewed its request for recognition and bargain by letter dated September 7, 2010. (Attached are letter dated September 7, 2010, and sworn statement of Union President Ricky Brown as Exhibit 2 and 3, respectively, attesting that such a request was made). In Westinghouse Learning Corporation, 211 NLRB 19, 34 (1974) a case in which an employer refused the Union's request to discuss a prospective date for an initial collective bargaining session on grounds that the certification had not yet issued, the Board affirmed the ALJ's findings and concluded that the initial action by the respondent (refusal to meet and bargain) in light of the union's subsequent post-certification request, and respondent's persistence in refusing to meet and bargain with the Union demonstrated an unwillingness to accept its obligation to meet and bargain in good faith with unit employees' representatives violated Section 8(a) (5) and (1).

5. Respondent's denial of Complaint paragraphs 8 and 9 and its first and third affirmative defenses do not present any serious dispute of facts as both allegations call for a conclusion of law, and it is well established that a refusal to recognize and bargain with the bargaining representative of the employees in an

appropriate unit, interfere with the employees' rights guaranteed in Section 7 of the Act and constitutes an unfair labor practice affecting commerce. NLRB v Reliance Fuel Oil Corp, 371 U.S. 224 (1963). See also Atlas Hotels, Inc., 205 NLRB 331, 332 (1973), where the Board, in ruling on a motion for summary judgment, found without merit the respondent's contention that a denial of the paragraph of the complaint which alleges that the respondent's acts constitute an unfair labor practice affecting commerce raised substantial questions of fact that need to be resolved in a hearing.

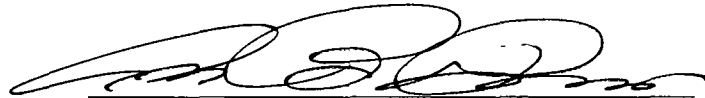
6. Respondent's second affirmative defense is also unavailing. Section 10 (b) of the Act provides, in part, that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and service of the copy thereof upon the person against whom such charge is made. 29 U.S.C., Sec 160 9(b). The Union in this proceeding filed a refusal to bargain charge in Case 24-CA-10951 on July 1, 2008, which is less than 6 months after Respondent commenced its continuous refusal to recognize and bargain. Once again it is noted that Respondent has not denied that it continues to refuses to recognize and bargain with the Union. Furthermore, Respondent's statute of limitation defense is without merit, as the conduct alleged in the Amended Complaint commenced on June 16, 2008, and the original charge was filed on July 1, 2008, within the Section 10 (b) period prescribed by the Act, and therefore, none of the allegations of the complaint are time barred.

WHEREFORE, there being no issue to be determined at a hearing, as all material issues have previously been considered and decided in the prior representation proceeding in Case 24-RC-8577, and cannot now be re-litigated, and there being no genuine issue as to any material fact alleged in the Complaint and Notice of Hearing, it is hereby respectfully requested that the Board find that the Respondent, by refusing to recognize and bargain with the Union as the collective bargaining representative of the employees in the unit, has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a) (1) and (5) of the Act. It is further requested, therefore, that the Board issues an Order requiring the Respondent to, upon request, bargain collectively with the Union as the exclusive representative of all the employees in the appropriate unit, and if an understanding is reached, embody such understanding in a signed agreement. It is further requested that said Order include the posting of a Notice to employees, in both the English and the Spanish languages, as is customary in this Region.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, it is further requested that the Board in its Order direct that the initial year of certification begin on the date the Respondent commences to bargain in good faith with the Union as the certified bargaining agent of the appropriate unit. Mar-Jac Poultry Co., 136 NLRB 785 (1962); Lamar Hotel, 140 NLRB 226, 229 (1962), *enfd.* 328 F.2d 600 (5<sup>th</sup> Cir. 1964), *cert. denied* 379 U.S. 817 (1964); and Burnett

Construction Co., 149 NLRB 1419, 1421 (1964) enfd. 350 F.2d 57 (10<sup>th</sup> Cir. 1965), and any such further relief as may be appropriate.

**RESPECTFULLY SUBMITTED**, at San Juan, Puerto Rico, this 30<sup>th</sup> day of September, 2010.



Ana Beatriz Ramos-Fernandez  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 24  
La Torre de Plaza, Suite 1002  
525 F.D. Roosevelt Ave.  
San Juan PR 00918-5276  
Tel. (787) 766-5276  
Fax. (787) 766-5478  
e-mail: ana.ramos@nrlrb.gov

**CERTIFICATE OF SERVICE**

I hereby certify that the "**STATEMENT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**" has been served on the following parties via Electronic

Mail:

Our Virgin Islands Labor Union  
e-mail: ovilu4u@msn.com

Charles E. Engeman, Esq.  
Ogletree, Deakins, Nash, Smoak & Stewart, LLC  
e-mail: charles.engeman@odnss.com

Dated at San Juan, Puerto Rico this 30<sup>th</sup> day of September 2010.

A handwritten signature in black ink, appearing to read 'Ana Beatriz Ramos-Fernandez', written over a horizontal line.

Ana Beatriz Ramos-Fernandez  
Counsel for the Acting General Counsel

J.S. CARAMBOLA, LLP d/b/a/  
CARAMBOLA BEACH RESORT,  
  
and  
  
OUR VIRGIN ISLANDS LABOR UNION  
(OVILU)

OUR VIRGIN ISLANDS LABOR UNION )  
(OVILU) )  
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**COMES NOW**, J.S. CARAMBOLA, LLP, d/b/a CARAMBOLA BEACH RESORT (“Carambola”) and answers the Amended Complaint and Notice of Hearing ("Amended Complaint") issued in the above-captioned case.

1. Carambola is without sufficient knowledge to assess the truth or falsity of the allegation contained in paragraph 1 of the complaint, and it is therefore Denied. By way of further answer, to Carambola's knowledge the charge has never been amended and the refusal to bargain in 2008 was entirely appropriate and lawful for the reasons stated in *New Process Steel, L.P. v. NLRB*, 136 S.Ct. 2635 (2010).

2.
  - (a) Admitted.
  - (b) Admitted.
  - (c) Admitted.

3. Admitted.

EXHIBIT 1

5. Carambola is without sufficient knowledge to assess the truth or falsity of the allegation contained in paragraph 5 of the complaint, and it is therefore Denied.

6. (a) Admitted.

(b) Denied. By way of further answer, based on its original objections to the election and exceptions to the report and recommendation of the hearing officer Carambola denies that OVILU was a properly certified representative of the Unit.

7. (a) Admitted in part, denied in part. By way of further answer, Carambola admits that it received an email in June 2008 from OVILU requesting that it bargain collectively with them, however, for the reasons stated by the United States Supreme Court in *New Process Steel*, Carambola was correct that it was not obligated to recognize and bargain with OVILU as it was not properly certified as the bargaining representative of the Unit. At the time of the NLRB issued its amended complaint, OVILU had made no new demand for recognition or bargaining and this Amended Complaint is premature.

(b) Denied. By way of further answer, Carambola states that it properly refused to bargain with OVILU because Carambola has properly challenged the certification of OVILU as the bargaining union for the Unit. As of the date of the Amended Complaint, OVILU had made no new demand for recognition or bargaining and this Amended Complaint is premature.

8. Denied.

9. Denied.

## **I. FIRST DEFENSE**

Carambola denies that it has engaged in or is engaging in any unfair labor practices in violation of the National Labor Relations Act ("Act"), as alleged in the Complaint.

## **II. SECOND DEFENSE**

To the extent that any allegations of the Complaint are outside the six-month statute of limitations for unfair labor practice charges, those allegations are time-barred and may not be brought as part of the Complaint.

## **III. THIRD DEFENSE**

Carambola denies each and every allegation of the Complaint that is not specifically admitted.

**WHEREFORE**, having fully answered the Amended Complaint, Carambola demands that the Amended Complaint be dismissed in its entirety and that the Board award Carambola its attorneys' fees and such other relief as the Board finds just and proper.

Respectfully submitted,

**OGLETREE, DEAKINS, NASH, SMOAK &  
STEWART, LLC**

DATED: September 23, 2010

By: /S/ Charles E. Engeman  
Charles E. Engeman, Esq.  
The Tunick Building, Suite 201  
1336 Beltjen Road  
St. Thomas, USVI 00802  
Telephone: (340) 714-1235  
Facsimile: (340) 714-1245

Attorneys for J.S. Carambola, LLP.

**CERTIFICATE OF SERVICE**

I do hereby certify that on this 23rd day of Septemebr, 2010, a true and correct copy of the foregoing document was served by tele-fax and byplacing same in the United States mail, postage prepaid, addressed to:

Ricky Brown  
OVILU  
340- 778-0428 (fax)

Marta M. Figueroa  
Regional Director  
NLRB-San Juan, Puerto Rico  
787-766-5478 (fax)

/S/ Charles E. Engeman

**TELEPHONIC AFFIDAVID/SWORN STATEMENT**

**I, Ricky Brown, being first duly sworn upon my oath, hereby states as follows: I have given assurances by an agent of the National Labor Relations Board that this affidavit will be considered confidential by the United States Government and will not be disclosed as long as the case remains open unless it becomes necessary for the government to produce the affidavit in a formal proceeding. Upon the closing of this case, the affidavit may be subject to disclosure in accordance with Agency policy.**

**I receive mail at the following address: P.O. Box 8624 Christiansted, St. Croix, USVI, 00823. My telephone number is (340) 719-1464**

**I work for Our Virgin Islands Labor Union, with offices located in St. Croix USVI**

1. I'm the president of Our Virgin Islands Labor Union, a labor organization with offices in St. Croix, U.S. Virgin Islands since March 2006.

2. As part of my responsibilities I'm responsible for conducting the organizational campaigns, negotiation of collective bargaining agreements and the representation of members through the arbitration/grievance procedures and other appropriate forums. In addition, I'm responsible for the overall administration of the Union's internal matters.

3. On October 25, 2007, an election by secret ballot was conducted in Case 24-RC-8577 in which the Union obtained majority of valid votes. After several procedural proceedings at the Board, the Union on May 28, 2008, was certified by the Board as the exclusive bargaining representative

*RB*

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of the employees employed by the Employer (J.S. Carambola LLP, d/b/a as Carambola Beach Resort) in the appropriate unit.

4. After that the Union sent to the Employer several e-mails communications requesting recognition and to start bargaining for an initial contract. The first communication was sent on June 16, 2008. (Attached e-mail communications dated June 16 and June 24, 2008 as Exhibit 1)

5. The Employer contested the Board's certification and notified the Union that it was not going to negotiate during the pendency of the proceedings. (Attached e-mail dated October 1, 2008 as Exhibit 2).

6. On September 7, 2010, after the Board issued its Decision, Order and Certification of Representative dated August 6, 2010, the Union sent another letter to the Employer requesting once again recognition and to commence the negotiations for an initial contract. This letter was signed by me as president of the Union and sent by regular mail to the Employer's postal address. In addition, it was sent by e-mail to the Employer and to Mr. Charles E. Engerman attorney for the Employer at their respective e-mail addresses. Attached letter dated September 7, 2010 as Exhibit 3 and the e-mail transmittal as Exhibit 4)



September 7, 2010, nor in any other way contacted me or any other personnel of the Union.

I HAVE READ THE ABOVE STATEMENT, CONSISTING OF (3) PAGES AND UNDER OATH, STATE THAT TO THE BEST OF MY INFORMATION AND BELIEF THE FOREGOING IS TRUE AND CORRECT.

  
Ricky Brown

Subscribed and affirmed by Telephone  
at Christiansted St. Croix, USVI  
This 29<sup>th</sup> day of September, 2010

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Ana Beatriz Ramos- Fernandez  
National Labor Relations Board  
Field Attorney

LB

"Progressive People Paving The Way"

September 7, 2010

Eddie Sipple, General Manager  
Carambola Beach Resort  
P.O. Box 3031  
Kingshill, VI 00851

**Re: Collective Bargaining Negotiations**

Dear Mr. Sipple:

In Accordance with the August 6, 2010 Certification of Representative certifying Our Virgin Islands Labor Union (OVILU) as the exclusive collective bargaining representative in NLRB Case #24-RC-8577, we hereby request that Carambola Beach Resort agree to meet with the appropriate Union representative(s) to begin discussion with the view to engage in collective bargaining negotiations.

We further hereby request that the Company inform the Union of adjustments of any and all matters relative to wages, hours, fringe benefits and other terms and conditions of employment to include any disciplinary action(s) or judgments affecting any employee included in the appropriate bargaining unit to date and hereafter. Moreover, we request that the Company provide the Union with a current list of all bargaining unit employees to include their respective dates of hire, position(s) or job title(s) and rate(s) of pay. Please forward this information as soon as possible.

Your cooperation and timely response is greatly appreciated. Please do not hesitate to contact me with any questions or concerns.

Sincerely,



Ricky Brown  
President

cc: Charles Engeman, Esq., Counsel for Employer/Carambola Beach Resort  
Sigfredo Nieves, Compliance Officer – NLRB, Region 24

Suite #3, Watapana Mall 298 Peter's Rest - Post Office Box 8624 Christiansted, St. Croix, U.S. V.I. 00823

Telephone: (340) 719-1464 • Fax: (340) 778-0428

Founded May 20<sup>th</sup>, 1999

EXHIBIT 3



## Request for Collective Bargaining Negotiations

From: **OVILU** (ovil4u@msn.com)  
Sent: Mon 9/27/10 10:26 AM  
To: ana Ramos (ana.amos@nlrb.gov)  
1 attachment  
scan0002.pdf (655.9 KB)

Here is the communication sent to Carambola Beach Resort representative(s) on September 7, 2010 via regular mail, and email as indicated to Human Resources Manager Maria Peter and Charles E. Engeman, Esq. and Counsel for the Employer.

Sincerely,

*Ricky Brown*  
President  
Our Virgin Islands Labor Union  
P.O. Box 8624  
Christiansted, VI 00823  
Tel: (340) 719-1464  
Fax: (340) 778-0428

This message is intended only for the use of the individual or entity to whom it is addressed; it contains information that is proprietary and confidential, and may be privileged and exempt from disclosure under applicable law. If the reader of this message is not the intended recipient or the employee or agent responsible for delivering the message to the intended recipient, you are hereby notified that any dissemination, distribution or copying of this communication is strictly prohibited. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE: (A) DO NOT READ THIS E-MAIL MESSAGE, FORWARD IT TO ANY PERSON, SAVE IT, PRINT IT, OR OTHERWISE USE IT; (B) DELETE IT FROM YOUR COMPUTER SYSTEM; AND (C) NOTIFY THE SENDER, BY RETURN E-MAIL, OF THE MISTAKEN TRANSMISSION. Thank you.

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